

DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219915 **DATE:** November 18, 1985
MATTER OF: Bancroft Investors

DIGEST:

1. Where doubt exists concerning the date the protester became aware of the basis for protest, doubt is resolved in favor of the protester.
2. Protester's failure to furnish contracting officer with a copy of its protest to GAO within one day of its filing, as required by Bid Protest Regulations, will not result in the dismissal of the protest where the purpose of this requirement is otherwise satisfied such as where protester filed a copy with the procuring agency's headquarters which notified the contracting officer telephonically of the protest. Furthermore, the agency has not been prejudiced by the delay in receiving a copy of the protest since it filed its report in a timely matter.
3. The protester has the burden of affirmatively proving bias or favoritism on the part of the procuring agency and where written record fails to demonstrate bias, the protester's allegations are to be regarded as mere speculation.
4. Protest that contracting agency held discussions with eventual awardee after best and final offers is denied where discussions which occurred more than 6 months after agency completed evaluation and recommended award were for the purpose of addressing issues raised in an administrative appeal contesting the agency's selection decision. There is no evidence in the record that proposed awardee was afforded any opportunity to revise its offer.

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5. Protest alleging that lease solicitation was defective since it did not provide for adequate parking is dismissed as untimely since protest was not filed until after the closing date for receipt of offers.
6. Protest alleging that awardee's offer should not have been found acceptable is denied since record establishes reasonable basis for agency's evaluation.

Bancroft Investors protests the award of a lease to R. L. Shaheen Company under solicitation for offers (SFO) No. GS-095-84856 issued by the General Services Administration (GSA). The SFO solicited offers for approximately 16,500 net usable square feet of office space in Carson City, Nevada to house the Federal Highway Administration (FHA) and the Bureau of Land Management (BLM) for a 5-year period, with a 3-year renewal option. Bancroft contends that GSA gave preferential treatment to Shaheen and conducted discussions with Shaheen after the receipt of best and final offers. Bancroft also alleges that Shaheen's offer was not properly evaluated.

We deny the protest in part and dismiss it in part.

In response to the SFO, issued on June 25, 1984, GSA received five offers. One offer was disqualified; the best and final offers submitted by the remaining four offerors were as follows:

	Offer rate
1. Shaheen	\$ 7.98
2. Duggan	\$ 8.15
3. Hernandez	\$ 9.29
4. Bancroft	\$11.40

After evaluating the offers, GSA determined that award to Shaheen, the lowest acceptable offeror, was in the government's best interests.

By letter dated December 20, 1984, GSA notified FHA and BLM of the intended award to Shaheen. FHA, currently housed in a building leased by Bancroft, refused to concur in the proposed relocation and formally appealed the matter to the GSA Regional Administrator. On April 25, 1985, a decision was issued by the Regional Administrator upholding the relocation and FHA subsequently appealed to the Administrator of GSA. A final decision was issued, again upholding the relocation, and on June 17, 1985, award was made to Shaheen. On that same day, Bancroft received a letter from GSA advising it of the award.

Bancroft's protest was filed with our Office on August 19, 1985 and GSA argues that it is untimely since it was not filed within 10 days of the date Bancroft knew or should have known the basis for protest. GSA states that Bancroft admits that by May 30, 1985, it was aware of the grounds which formed the basis for its allegations of improper discussions and unfair treatment. Accordingly, GSA asserts that the protest filed approximately two months later is untimely and should not be considered.

In addition, GSA complains that the protester failed to provide a copy of the protest to the contracting officer within 1 day of its filing with us as required by 4 C.F.R. § 21.1(d) (1985). Also, GSA indicates that Bancroft has never provided GSA a copy of Exhibit E to its protest and asserts that dismissal is warranted on this basis as well.

Bancroft responds that it promptly filed its protest with our Office as soon as documentation supporting its allegation was received under the Freedom of Information Act (FOIA). Bancroft states that until that time it had no support for its allegations and argues that it should not be penalized for seeking additional information before filing its protest. Also, Bancroft argues that it was in substantial compliance with the 1-day rule since a copy was sent to GSA headquarters and GSA in fact had timely notice of the basis for protest.

We resolve doubt surrounding the timeliness of a protest in favor of the protester. Builder's Security Hardware, Inc., B-213599.2, Feb. 15, 1984, 84-1 CPD ¶ 207. Bancroft's evidence in support of its allegation is based primarily on a memorandum written by an employee of FHA which was obtained under FOIA. Although Bancroft questioned GSA's conduct at an earlier date, we believe that Bancroft did not become aware of the actual grounds for its protest until it received the FOIA materials it had requested. There is nothing in the record which suggests that Bancroft

did not diligently pursue this information or timely file its protest after it received the additional documentation and accordingly, we find the protest timely.

With respect to GSA's contention that Bancroft's protest should be dismissed for failure to file a copy within 1 day with the contracting officer, Bancroft did promptly submit a copy to GSA headquarters in Washington, D.C. The contracting officer was notified telephonically by headquarters and received a copy of the protest from headquarters shortly thereafter. Also, it appears that the protester's failure to include Exhibit E in the copy of attachments sent to GSA was unintentional and GSA obtained a copy of the exhibit from our Office on August 28, 7 working days after its filing. Preparation of the agency report was promptly commenced.

Thus, while the contracting officer did not receive a copy of the protest from the protester in the manner prescribed by regulations, the protest will not be dismissed under 4 C.F.R. § 21.1(f) since we find under these circumstances that the essence and purpose of the regulation was otherwise satisfied. See Hewitt, Inc., B-219001, Aug. 20, 1985, 85-2 CPD ¶ 200; Florida Precision Systems, Inc. -- Request for Reconsideration, B-219448.2, Aug. 12, 1985, 85-2 CPD ¶ 160. Accordingly, the merits of Bancroft's protest will be considered.

Bancroft argues that GSA did not treat all offerors fairly and alleges that GSA assisted Shaheen in submitting its offer. Bancroft notes that Shaheen's initial offer was based on a build-to-suit basis and contends that a GSA representative requested Shaheen to withdraw this offer and submit an offer on an existing building. Also, Bancroft alleges that GSA improperly told Shaheen that it would be awarded the contract months before the actual award date and contends that this further supports its allegation of unfair treatment. Bancroft asserts that when it requested additional guidance in interpreting the SFO, GSA refused and merely referred Bancroft to the solicitation.

In addition, Bancroft contends that GSA improperly conducted discussions with Shaheen regarding the number of parking spaces which would be made available. Bancroft argues that the SFO was deficient in requiring only 22 reserved parking spaces and that GSA realized its error and negotiated with Shaheen for additional parking. Bancroft alleges that when the GSA Regional Administrator visited Carson City in May 1985, the lack of adequate parking, as

well as other issues, were discussed with Shaheen and that Bancroft was never provided an opportunity to discuss its proposal in this manner.

Also, Bancroft alleges that Shaheen's offer did not comply with the requirements of the SFO. Bancroft contends that Shaheen's building fails to provide access for handicapped persons, has no sidewalks and that no eating establishments are located within three blocks of the building. Bancroft further argues that Shaheen's proposed building is of warehouse quality construction and should not be considered first class office space. In addition, Bancroft complains that Shaheen's building is not within Carson City's business district but rather in the desert surrounded by warehouses and other manufacturing concerns. Bancroft argues that the award to Shaheen was not in the government's best interests and requests that the lease be awarded to Bancroft or that GSA be required to conduct a new competition.

GSA denies that any special advice or assistance was ever given Shaheen and contends that all offerors were treated fairly. The contracting officer states that Shaheen was never told which offer to submit but that during discussions Shaheen indicated that it could offer an existing building to GSA at a lower cost. The contracting officer states that he merely advised Shaheen that the firm was free to submit an offer for this property and that additional offer forms were sent to Shaheen to use if it decided to do so. GSA indicates that Shaheen subsequently offered existing office space and it was this offer that was considered by GSA.

Furthermore, the contracting officer states that he never advised Shaheen that it would be awarded the lease. GSA notes, however, that Shaheen's offer was determined to be the most advantageous to the government and recommended for award on December 20, 1984, and due to the protracted administrative appeal, it is conceivable that Shaheen learned that its offer had been recommended for award. With respect to GSA's alleged failure to provide assistance to Bancroft, GSA indicates that Bancroft was concerned with whether the existing office space configurations would be changed and GSA states that this information would not be made available until after award. GSA argues that Bancroft was properly referred to the SFO regarding this matter.

In addition, GSA contends that no improper negotiations with Bancroft were conducted and that Bancroft has misinterpreted events which occurred as part of the administrative

review of FHA's appeal. GSA indicates that its Regional Administrator visited both Shaheen's property and Bancroft's property in order to prepare a briefing for the Administrator of GSA. GSA states that Shaheen was not allowed to revise or supplement its offer after the receipt of best and final offers and that any discussions which occurred at that time concerned the suitability of Shaheen's property as challenged by FHA.

With respect to the number of parking spaces, GSA indicates that the SFO only required the lessor to provide 22 reserved spaces and that Shaheen agreed to provide this number. GSA contends that the availability of public parking was an evaluation factor and that this issue was discussed prior to the receipt of Shaheen's best and final offer. Due to additional construction adjoining the proposed lease site, GSA states, ample public parking will be available. GSA contends that Shaheen's offer was properly evaluated and fully met the requirements of the SFO. Accordingly, GSA argues that the award to Shaheen was proper.

The protester has the burden of affirmatively proving its case and unfair or prejudicial motives will not be attributed to procurement officials on the basis of inference or supposition. ALM, Inc. et al., B-217284 et al., Apr. 16, 1985, 85-1 CPD ¶ 433. The written record forms the basis for our protest decisions and where it fails to demonstrate favoritism or bias, the protester's allegations are properly to be regarded as mere speculation. Mechanical Equipment Co., Inc., B-213236, Sept. 5, 1984, 84-2 CPD ¶ 256.

We find the record does not support Bancroft's allegation of favoritism toward Shaheen. GSA has provided a reasonable explanation for its actions and denies that there was favoritism. The only evidence Bancroft offers in support of its allegation is a memorandum written by an FHA employee regarding the May 1985 visit to Shaheen's property by GSA's Regional Administrator. At that meeting, a Shaheen representative is alleged to have stated that he was requested to change his offer by GSA and that he had been "led to believe" that he would be awarded the lease. The representative, however, disagrees with the characterization of his statements and indicates that he only mentioned that he originally preferred to submit an offer on a build-to-suit basis, but due to financial considerations decided to offer space in an existing building. Also, Shaheen's representative indicates that he was advised that Shaheen was the low offeror but never received any assurances from

GSA that it would be awarded the contract. In short, there simply is no persuasive evidence here that the award was the result of favoritism.

We also find without merit Bancroft's allegation that GSA improperly conducted discussions with Shaheen after the receipt of best and final offers. Although Bancroft alleges that Shaheen provided information essential to the evaluation of its proposal at the meeting with GSA's Regional Administrator in May 1985, GSA had completed its evaluation of Shaheen's proposal and recommended it for award as of December 20, 1984, approximately five months earlier. No individual present at that meeting was involved in the evaluation of the offer submitted and in our view it is clear that the purpose of that meeting was simply to investigate matters raised by FHA in the pending administrative appeal. Shaheen offered to provide the number of reserved parking spaces required by the SFO and indicated that public parking would be provided in accordance with the building requirements imposed by Carson City. There is no evidence that Shaheen was afforded an opportunity to revise its offer to provide additional parking spaces or otherwise provided information essential for determining the acceptability of its proposal. Accordingly, we find that no improper post selection discussions occurred. See Anchorage Telephone Utility, B-197749, Nov. 20, 1980, 80-2 CPD ¶ 386.

To the extent Bancroft is arguing that the SFO was deficient in only requiring 22 reserved spaces, we find this allegation untimely. Under our Bid Protest Regulations, protests based on alleged improprieties in a solicitation which are apparent prior to the closing date for receipt of offer must be filed before that date. 4 C.F.R. § 21.2(a)(1). If Bancroft thought that the SFO was deficient in the number of parking spaces which were required, it was incumbent upon Bancroft to protest prior to the closing date for receipt of offers. Bancroft's protest was not filed until August 1985, more than 9 months after the closing date for receipt of best and final offers. Accordingly, this issue is untimely raised and will not be considered.

Finally, we note that GSA argues that Bancroft is not an interested party to challenge its evaluation of Shaheen's offer since Bancroft submitted the highest cost offer and

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two other offerors were lower in price than Bancroft.^{1/} However, the record does not show that GSA evaluated the intervening offers as acceptable, and as a result, we are unable to conclude that Bancroft would not have been next in line for award. In any event, our review in such matters is limited to examining whether the agency's evaluation was fair and reasonable and consistent with the stated evaluation criteria. The City of Spartanburg, B-214161, Nov. 2, 1984, 84-2 CPD ¶ 487. Bancroft bears the burden of affirmatively proving that the challenged evaluation was improper. Delmae Co., B-214082, July 10, 1984, 84-2 CPD ¶ 36.

We find no evidence that Shaheen's offer was not properly found acceptable by GSA. Shaheen took no exception to the requirements of the SFO, including handicapped accessibility, and although the property was originally a warehouse, Shaheen offered to remodel the building into first class office space and professionally landscape the area. In addition, the SFO only required the property to be located within the city limits of Carson City and Shaheen's property complies with this requirement. With respect to the availability of eating establishments, GSA indicates that none was available within three blocks of Shaheen's property and that Bancroft's offer was evaluated higher than Shaheen's in this respect. However the SFO indicates that this is only one of several additional factors to be considered by GSA and in view of Shaheen's proposed price, we cannot find GSA's determination that Shaheen's offer was the most advantageous to the government to be unreasonable. In our view, GSA has established a reasonable basis for its evaluation of Shaheen's offer and its conclusion that the building proposed by Shaheen was acceptable. Accordingly, we find this basis for protest also without merit.

The protest is denied in part and dismissed in part.

for *Seymour Efron*
Harry R. Van Cleve
General Counsel

^{1/} Although Bancroft submitted a second offer which significantly reduced its price, this offer was not submitted until February 26, 1985, approximately 3 months after the closing date for receipt of best and final offers and properly was not considered by GSA.